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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed Rules of the State Department of Public Safety Governing School Bus Drivers and Medical Qualifications for Commercial Driver's License	**ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26 AND MINN. R. 1400.2300**

This matter came before Administrative Law Judge Eric L. Lipman upon the application of the Minnesota Department of Public Safety (the Department) for a legal review under Minn. Stat. § 14.26.

On November 18, 2011, the Department filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.26 and Minn. R. 1400.2300.

Based upon a review of the written submissions by the Department, and all of the documents in the rulemaking record,

IT IS HEREBY ORDERED THAT:

1. The agency has the statutory authority to adopt the rules.

2. With one exception, the rules were adopted in compliance with all procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400. As to this one exception, the undersigned concludes, as set forth in the Memorandum below, that the procedural defect was a harmless error.

3. With one exception, the rules are needed and reasonable. Part 7421.0400, subpart 1 is **DISAPPROVED** as not meeting the requirements of Minn. Stat. § 14.06 (a) and Minnesota Rules part 1400.2100, items D and E.

4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: December 2, 2011

/s/ Eric L. Lipman

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ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings[1] identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements, unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional[2] or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

In the present rulemaking process, the Administrative Law Judge (ALJ) has found two defects in the rules, one of which is a harmless procedural error. All other rule parts are approved.

Procedural Defect under Minn. R. 1400.2100, Item A

Minn. Stat. § 14.101, subd.1 requires agencies to seek comment from the public on the subject matter of potential rules within 60 days of the effective date of an amendatory law directing the agency to adopt such rules. The statute provides:

> In addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the

[1] Minn. R. 1400.2100.

[2] In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *See, Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

> proposal, an agency, at least 60 days before publication of a notice of intent to adopt or a notice of hearing, shall solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing notice to be published in the State Register. The notice must include a description of the subject matter of the proposal and the types of groups and individuals likely to be affected, and must indicate where, when, and how persons may comment on the proposal and whether and how drafts of any proposal may be obtained from the agency.
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> This notice must be published within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed.

The Department acknowledges that while the delegation of rulemaking authority was effective on the day following enactment – April 20, 2010[3] – it did not publish a request for comments, pursuant to Minn. Stat. § 14.101, subd. 1, until March 28, 2011. The omission is a procedural defect.

A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if: "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process."

It bears emphasizing that the Department received no comments from interested persons when it belatedly published a Request for Comments.[4] Likewise important, as a curative measure, it sent copies of its draft rules to those who were enrolled on the official rulemaking list and to the persons and organizations listed in its additional notice plan. Further, the Department hosted a stakeholder meeting to receive comments from interested persons – and did receive feedback on the proposed rules at that session.[5]

Based upon this record, the Administrative Law Judge concludes that the Department took corrective action to cure the defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The defect is a harmless error.

Substantive Defects under Minn. R. 1400.2100, Items D and E

In rule part 7421.0400, subpart 1, the Department proposes to establish a requirement for periodic physical exams of those who hold a Commercial Drivers License. The proposed rule reads:

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[3] *See,* 2010 Laws of Minnesota, Chapter 242, Section 10.

[4] Exhibit D, Statement of Need and Reasonableness, at 4.

[5] *See,* Ex. O, Sign-In Sheet for August 31, 2011 Meeting.

> If a CDL holder certifies to the category of motor vehicle operation that the CDL holder operates, or expects to operate under Minnesota Statutes, section 171.162, subdivision 2, clause (1) or (3), then the CDL holder must pass a physical examination every two years, or as required by the medical examiner, in order to maintain a certified medical certification status on the driving record.

To the extent that the phrase "the CDL holder must pass a physical examination every two years, *or as required by the medical examiner*," authorizes a medical examiner to require a CDL holder be examined less than every 24 months, the proposed rule is defective. Federal law requires that, at a minimum, these examinations occur once every 24 months.[6] A state agency may not promulgate a rule that is in conflict with federal law.

In this context, it is worth noting that the Department's intention was to provide for physical examinations of CDL holders every two years, *or more often*, as directed by a medical examiner.[7] Yet, unlike its Statement of Need and Reasonableness, the Department's proposed rule does not contain any language qualifying the medical examiner's authority to set a different interval for examinations.

Among the possible cures to this defect would be to include a phrase like "or more often than every two years, as required by the medical examiner," to the regulation. Amending the proposed rule in this way is needed and reasonable and would not result in rules that are substantially different from those originally published in the State Register.

E. L. L.

[6] *See,* 49 C.F.R. § 391.45.

[7] Exhibit D, Statement of Need and Reasonableness, at 22.